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IN THE

Supreme Court of the United States

October Term 1947

No.................

Crules R. Cheek, Trustee in Bankruptcy of West Beverly Corporation, Bankrupt,

Petitioner and Appellant Below,

vs.

Division of Labor Law Enforcement, State of California,

Respondent and Appellee Below.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved.

On January 31, 1946, a petition in involuntary bankruptcy was filed against West Beverly Corporation, a California corporation, the bankrupt herein. In due course, labor lien claims were filed by the Division of Labor Law Enforcement of California, respondent herein, on behalf

of Carl R. Fernando and William A. Turner for personal services rendered to the bankrupt within three months prior to the general assignment for the benefit of creditors but more than four months prior to bankruptcy. The bankruptcy occurred less than four months after the general assignment.

These labor lien claims were based upon California Code of Civil Procedure, Section 1204, which pertains to rights of unpaid wage claimants upon an assignment for the benefit of creditors. The Division of Labor Law Enforcement took the position that this code section gave to such wage claimants a lien upon the assets in the hands of the assignee, which lien by virtue of Section 67(b) of the Bankruptcy Act (U. S. C., Title 11, Chapter 7, Section 107) survived bankruptcy proceedings commenced less than four months after the assignment.

The services were performed more than three months prior to the bankruptcy and respondent makes no claim for priority under Section 64(a)(2) of the Bankruptcy Act (U. S. C., Title 11, Chapter 7, Section 104).

The trustee of the bankrupt estate filed objections to these two claims and took the position that California Code of Civil Procedure, Section 1204, failed to create an actual lien, and even assuming a lien to have been created, such lien was totally dependent upon the general assignment and fell with such assignment upon the commencement of the bankruptcy proceedings.

Upon hearing before the referee the objections of the trustee were sustained and the referee held that said claimants could qualify only as general creditors. The referee took the position that under Section 1204 the rights of the claimants arose with the general assignment and fell with

the bankruptcy occurring within four months subsequent to the assignment. The bankruptcy completely voided the general assignment and everything connected with it.

The Division of Labor Law Enforcement brought the question before the District Court on a petition for review, and the district judge reversed the order of the referee and held that Section 1204, California Code of Civil Procedure, gave these claimants a statutory lien which survived the bankruptcy and came within Section 67(b) of the Bankruptcy Act.

The trustee took the matter on appeal to the Circuit Court of Appeals for the Ninth Circuit, which court affirmed the ruling of the District Court giving effect to the lien claims of the wage earners.

Jurisdiction.

1. The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. 347). Judgment was entered in this case by the United States Circuit Court of Appeals on March 4th, 1948 [R. 59]; a petition for rehearing was filed April 2, 1948; and an order denying said petition was made and filed April 5, 1948 [R. 60].

The Question Presented.

1. Does Section 1204 of the California Code of Civil Procedure create a valid statutory lien in favor of wage claimants upon a general assignment for the benefit of creditors, which lien survives a subsequent bankruptcy by virtue of Section 67(b) of the Bankruptcy Act?

Reasons for Granting the Writ.

1. In holding that a statute such as California Code of Civil Procedure, Section 1204, creates for wage claimants a statutory lien which survives bankruptcy proceedings, the Circuit Court of Appeals for the Ninth Circuit has rendered a decision in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit on a question of almost exact similarity.

In the case of *In re Ko-Ed Tavern,* 129 F. (2d) 806, the Circuit Court of Appeals for the Third Circuit, in ruling upon a New Jersey statute similar to California Code of Civil Procedure, Section 1204, said that upon bankruptcy the effect of such a statute was to create a preference and not a lien and that "such situations are without applicability to bankruptcy proceedings" (at page 810). Such direct conflict of interpretation and judicial ruling by different circuit courts of appeal should be settled by this court.

2. The matter of the rights of wage earners upon the insolvency of the employer is one of constant concern to the legislatures and the judiciary as well as to the multitudes even more directly concerned. The rulings of the District Court and the Circuit Court herein have resulted only in adding confusion to the significance of the pertinent clauses of the Bankruptcy Act, and the state law involved. The various state legislatures need an authoritative and single judicial guide as to what is required to create for such wage claimants a valid statutory lien within the meaning of Section 67(b) of the Bankruptcy

Act. This is definitely a federal question of general importance, the answer to which lies with this court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of said court, numbered 11762, and had in the case numbered and entitled on its docket number 44,243, P. H., in the matter of West Beverly Corporation, a corporation, Bankrupt, in the District Court of the United States, in the Southern District of California, Central Division, to the end that this case may be reviewed and determined by this court as provided by the statutes of the United States; and that the judgments herein of said Circuit Court and said District Court be reversed and that said courts be directed to enter judgment affirming the order of the referee and for such further relief as to this court may seem proper.

Dated this 23rd day of June, 1948.

Francis F. Quittner,
Attorney for Petitioner and Appellant Below.

State of California, County of Los Angeles—ss.

Francis F. Quittner, being first duly sworn, deposes and says, that he is the attorney for the petitioner named in the foregoing Petition of Writ of Certiorari; that he has read the foregoing Petition for Writ of Certiorari and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated upon his information or belief, and as to those matters, that he believes them to be true.

FRANCIS F. QUITTNER.

Subscribed and sworn to before me this 25th day of June, 1948.

(Seal) ROSAMOND LEVY,

Notary Public in and for the County of Los Angeles, State of California.

My commission expires August 25, 1950.

IN THE

Supreme Court of the United States

October Term, 1947

No.................

Crules R. Cheek, Trustee in Bankruptcy of West Beverly Corporation, Bankrupt,

Petitioner and Appellant Below,

vs.

Division of Labor Law Enforcement, State of California,

Respondent and Appellee Below.

Brief in Support of Petition for Writ of Certiorari.

The Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit is reported in 166 F. (2d) 429. The opinion is also printed in full in the record [R. 55-58].

Jurisdiction.

The grounds and facts concerning jurisdiction are set forth in the foregoing petition.

Statement of the Case.

Petitioners and respondents herein are not in conflict as to the facts in this matter. Prior to the commencement of the within bankruptcy proceeding, the bankrupt employed one Carl R. Fernando and one William A. Turner to perform personal services. On October 2, 1945, the bankrupt made a general assignment for the benefit of its creditors. On January 31st, 1946, this proceeding in bankruptcy commenced when a petition in involuntary bankruptcy was filed.

Prior to the commencement of the bankruptcy proceedings, and subsequent to the assignment for the benefit of creditors, the aforesaid employees of the bankrupt, through the Division of Labor Law Enforcement, filed with the assignee for the benefit of creditors a formal written notice by which they claimed prior labor liens pursuant to the provisions of Section 1204 of the Code of Civil Procedure of the State of California. The lien claim of Carl R. Fernando was in the sum of $200.00 and the lien claim of William A. Turner was in the sum of $82.50, such amounts being for unpaid wages for services rendered within ninety (90) days prior to the assignment for the benefit of creditors. Such services were rendered more than three months prior to the commencement of the bankruptcy proceedings.

The manner in which the trustee filed objections to these two claims, the ruling of the referee sustaining the objections, the review of the matter before the district judge and his order reversing the referee, and the appeal before

the Circuit Court are briefly described in the summary statement presented in the foregoing petition. The issue in this matter is solely one of law and concerns interpretation and inter-relationship of a California statute and an Act of Congress, specifically California Code of Civil Procedure, Section 1204, and Section 67(b) of the Bankruptcy Act (U. S. Code, Title 11, Chapter 7, Section 107).

The referee sustained the trustee's objections to said claims on the ground that any alleged lien was wholly dependent upon the general assignment and that upon the commencement of the bankruptcy proceeding, the assignment and everything dependent upon it fell and was void. The District Court agreed with the contention of the Division of Labor Law Enforcement that Section 1204 created a valid lien and that such lien came within the provisions of Section 67(b).

Upon the facts and issues as indicated the Circuit Court affirmed the decision of the District Court.

Summary of Argument.

Point I. Wage claimants must have a valid statutory lien to qualify under Section 67(b) of the Bankruptcy Act.

Strom v. Peikes, 123 F. (2d) 1003.

Section 1204 of California Code of Civil Procedure fails to create a lien such as is contemplated and covered by Section 67(b). Like the New Jersey statute in the matter of *Ko-Ed Tavern, Inc.,* 3rd Cir., 129 F. (2d) 806, the provisions of Section 1204 are without applicability to bankruptcy proceedings.

Prior to its amendment in 1945 Section 1204, as conceded by all parties hereto, created no lien, but merely a preference of payment in favor of wage claimants. The 1945 amendment of this statute failed to increase its effect so as to create such a lien.

Point II. The lien allegedly created by Section 1204 of California Code of Civil Procedure could not survive a bankruptcy occurring within four months of the assignment for the benefit of creditors, upon which the lien is predicated. The only thing which made possible the alleged lien was the assignment for the benefit of creditors. Bankruptcy proceedings completely void and nullify a general assignment if commenced within the proper time. Consequently, the provisions of Section 67(b) of the Bankruptcy Act are not applicable to the situation presented by the facts of this case.

Point III. The Bankruptcy Act provides for priority of payment out of bankrupt estates of wages earned within three months of bankruptcy. Section 64(a)(2). The interpretation of Section 1204 of the California Code of Civil Procedure by the District Court as affirmed by Circuit Court would extend to seven months the priority

in which priority rights accrued to wages. Where Congress has expressed itself so directly, its provisions are exclusive, and a state statute having the effect of contradicting or altering such provisions must at least to such extent be rejected and disregarded.

Errors Relied Upon.

1. The United States Circuit Court of Appeals erred and held in conflict with applicable decisions of other circuit courts, in holding that Section 1204 of the Code of Civil Procedure of the State of California creates a valid statutory lien within the meaning and scope of Section 67(b) of the Bankruptcy Act in favor of wage claimants against the assets which come into the possession of an assignee for the benefit of creditors and which subsequently come into the possession of a trustee in bankruptcy, and in failing to hold that such statute is effective merely to provide a priority or preference in payment of such claims.

2. The Circuit Court erred and held in conflict with applicable decisions of other circuit courts in affirming the District Court ruling that the lien allegedly created by Section 1204 upon the general assignment survived the commencement of bankruptcy proceedings and in failing to hold that bankruptcy proceedings commenced within four months of the general assignment completely avoided the assignment, including the alleged lien.

3. The Circuit Court erred and held in direct conflict with the provisions of the Bankruptcy Act in affirming the district judge's interpretation of Section 1204, such ruling having the effect of extending to seven months the period in which priority rights accrue to wages, the determination of Congress as to priorities of payment, having been exercised, being exclusive of provisions of state statutes.

ARGUMENT.

POINT I.

Section 1204 of the Code of Civil Procedure of the State of California Does Not Create a Valid Statutory Lien Within the Meaning and Scope of Section 67(b) of Bankruptcy Act in Favor of Wage Claimants Against the Assets Which Come Into the Possession of an Assignee for the Benefit of Creditors and Which Subsequently Come Into the Possession of a Trustee in Bankruptcy, but Is Effective Merely to Provide a Priority or Preference in Payment of Such Claims.

In the proceedings below it was not challenged by either respondent or the courts that for wage claimants to come within the provisions of Section 67(b) they must have claims which are in fact given liens by statute and not merely given preference or priority. *Strom v. Peikes* (123 F. (2d) 1003), is the uncontradicted authority for such proposition.

Section 1204 of California Code of Civil Procedure is as follows:

> "When any assignment, whether voluntary or involuntary, and whether formal or informal, is made for the benefit of creditors of the assignor, or results from any proceeding in insolvency or receivership commenced against him, or when any property is turned over to the creditors of a person, firm, association or corporation, or to a receiver or trustee for the benefit of creditors, the wages and salaries of minors, mechanics, salesmen, servants, clerks, laborers, and other persons, for personal services rendered such assignor, person, firm, association or corporation, within 90 days prior to such assignment, or the taking over of such property, or to the commence-

ment of the proceeding when a court action is involved, and not exceeding two hundred dollars ($200) each, constitute preferred claims and liens as between creditors of the debtor, and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor, insolvent, or debtor whose property is so turned over, and must be paid as soon as the money with which to pay same becomes available. If there is insufficient money with which to pay all such labor claims in full the money available must be distributed among the claimants in proportion to the amount of their respective claims. The trustee, receiver or assignee for the benefit of creditors shall have the right to require sworn claims to be presented and shall have the right to refuse to pay any such preferred claim, either in whole or in part, if he has reasonable cause to believe that such claim is not valid but must pay any part thereof that is not disputed, without prejudice to the claimant's rights, as to the balance of his claim, and withhold sufficient money to cover the disputed portion until the claimant in question has a reasonable opportunity to establish the validity of his claim by court action, either in his own name or through an assignee.

This section is binding upon all the courts of this State and in all receivership actions the court must order the receiver to pay promptly out of the first receipts and earnings of the receivership, after paying the current operating expenses, such preferred labor claims and such liens."

Prior to 1945, Section 1204, of the Code of Civil Procedure of the State of California read exactly as at present, with the exception of the absence then of the words, "and liens as between creditors of the debtor," and "and

such liens," which words were added in 1945 to follow the clause, "and not exceeding two hundred dollars ($200) each, constitute preferred claims," and to conclude the section, respectively.

It was not contended by respondent that prior to 1945 Section 1204 created such a lien as would come within the purview of Section 67(b) of the Bankruptcy Act. Section 1204, prior to 1945, was clearly within the governing rule of *Strom v. Peikes,* 123 F. (2d) 1003 (C. C. A. 2). As a matter of fact, it was upon the basis of *Strom v. Peikes,* that the California State Legislature, urged by the attorneys for the Division of Labor Law Enforcement, amended Section 1204 of the Code of Civil Procedure of the State of California in 1945. The Legislature may well have intended thereby to create lien rights on behalf of wage claimants. If so, however, the effort of the Legislature was quite ineffective.

In the case of *Winrod v. Wolters,* 141 Cal. 399, an attempt was made by certain laborers to have preferred claims arising out of Section 1206 of the Code of Civil Procedure of the State of California (a section giving preference to wage claims upon levying of attachment, garnishment, or execution) be deemed a lien in equity as against an attaching creditor or debtor, and the sheriff who levied the attachment. The Supreme Court of the State of California refused to regard this section as conferring a lien or lien rights, and said, *inter alia:*

> "When the legislature intends to give a lien, it says so, *and prescribes the conditions under which it shall exist, as in the Mechanics' Lien Law and in the statutes giving laborers liens upon certain property.*" (At page 402; emphasis added.)

There are of record in California no decisions expressing the views or interpretations of any court on this phase of Section 1204. The issue presented is a matter of first impression in the state and federal courts of California.

Convincing authority directly in point, in a 1942 decision of the Circuit Court of Appeals for the third circuit (*In the Matter of Ko-Ed Tavern, Inc.,* 129 F. (2d) 806) was lightly dismissed by the Circuit Court herein with a comment of considerable understatement: "But some of the reported decisions cast doubt upon the view that such a lien survives bankruptcy." [R. 57.]

The *Ko-Ed Tavern* case involved a New Jersey statute which provided:

> "In case of the insolvency of a corporation, all persons doing labor or service of any character, in the regular employment of the corporation, shall have a lien upon its assets for the wages due them respectively for all labor, work and services performed within two months next preceding the date when insolvency proceedings shall be actually instituted against such insolvent corporations." (N. J. Rev. Stat. (1937), 14:14-21.)

Like the effort of the California Legislature in California Code of Civil Procedure, Section 1204, this New Jersey statute purported to protect wage earners in the event of insolvency of the employer by the granting of a lien.

As in the instant case, the claimant in the *Ko-Ed Tavern* case had performed his services more than three

months prior to bankruptcy and was claiming a lien under the statute by virtue of the fact that insolvency proceedings had been pending involving the employer for some six months immediately prior to the bankruptcy.

The Circuit Court held that upon the bankruptcy of the subject corporation the effect of this statute was to give only a preference of payment out of the funds in the hands of the Receiver, and that no true lien was created. The court stated that:

> *"Such statutes are without applicability to bankruptcy proceedings. Upon the happening of bankruptcy they are superseded by the Bankruptcy Act, whose provisions alone cover the matter of priority among claimants."* (At page 810; emphasis added.)

By its ruling in the present matter the Circuit Court of Appeals for the 9th Circuit has thus expressed itself in direct conflict with the decision of the Third Circuit in the *Ko-Ed Tavern* case on the question of whether such a state statute creates a lien which survives bankruptcy.

In disregarding the *Ko-Ed Tavern* case and in arriving at the opposite result, the Circuit Court herein relied strongly upon *In re Bennett,* 153 Fed. 673, a decision of the Circuit Court of Appeals for the Sixth Circuit rendered in 1907 in interpreting the priority clause under the 1898 Bankruptcy Act. Little reason can be found for such reliance. *In re Bennett* merely upheld the right to priority under old Section 64(b)(7) of a debt given priority by state law. The case is not only not in point, but it was rendered obsolete by the 1938 amendment of the Bank-

ruptcy Act which replaced former Section 64(b)(7) with present Section 64(a)(5). Under the new provision, state-allowed priorities are no longer recognized for the purpose of allowing prior payments under this section of the Bankruptcy Act. Furthermore, the wage claimants herein make no claim to priority rights under Section 64, but rely solely on claim of lien.

The 1945 amendment to Section 1204 of the Code of Civil Procedure of the State of California had no material, visible or actual result in altering the effect of that section to create a lien interest in favor of such wage claimants. The issue herein represented under this statute is still fully controlled by *Strom v. Peikes,* 123 F. (2d) 1003 (C. C. A. 2), 138 A. L. R. 937, discussed *supra.*

What exactly did the California Legislature do to this section by the amendment of 1945? In essence, it simply added the word "lien" to a section covering priority of payments to wage claimants upon assignments for benefit of creditors.

What kind of lien? On what? By what means is it to be enforced? In what manner are creditors to be informed? Where is there any provision for recording such lien?

It is submitted that the California Legislature, whatever its intent may have been, cannot and did not, by the mere addition of the word "lien", and without providing procedural steps to create such a lien, without providing any means of enforcing it, create a valid lien cognizable under Section 67(b) of the Bankruptcy Act.

POINT II.

The Alleged Lien of California Code of Civil Procedure Section 1204 Could Come Into Being Only Upon a General Asisgnment for the Benefit of Creditors and When, Upon the Filing of the Bankruptcy Petition, the General Assignment Was Voided and Superseded, the "Lien," Depending Completely Upon the Assignment Also Became Void and of No Effect.

Your petitioner emphasized this point before the District Court and the Circuit Court. The Circuit Court, in its opinion [R. 56-57] acknowledged the argument, but did not answer it other than to quote a part of Section 67(b) of the Bankruptcy Act.

The referee, in the original ruling herein [Memorandum on Trustee's Objections, R. 23-27] presented basic reasons and authority to show that whatever lien there may have been was completely dependent upon the general assignment and fell with it when the assignment was totally nullified by the commencement of bankruptcy proceedings. The case of *Randolph v. Scruggs,* 190 U. S. 533, is longstanding authority for the proposition that all aspects of a general assignment for the benefit of creditors are voided upon the commencement within the designated time of bankruptcy proceedings, and that the avoidance dates back to the time of the assignment. Though presented by appellant below, this case was not acknowledged in the opinion of the Circuit Court.

The ruling of the Circuit Court that the alleged liens survived the initiation of bankruptcy proceedings totally ignores the clear mandate of the Bankruptcy Act as expressed in Section 70(a)(8), United States Code, Title 11, Chapter 7, Section 110.

Section 70(a) vests in the Trustee, as of the date of filing the petiton in bankruptcy, the title of the bankrupt to all "property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purpose of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the Court. . . . The title of the Trustee shall not be affected by the prior possession of the Receiver or any officer of any court."

U. S. Code, Title 11, Chapter 7, Section 110.

In the matter before the Court, the very act of bankruptcy and the basis of the involuntary petition filed against this bankrupt was a general assignment for the benefit of creditors made within four (4) months prior to the filing of the petition. The assignee held only as the agent of the bankrupt; the trustee took the bankrupt's title; the assignment was completely avoided as of the date of its creation; there simply were no assets on which these wage claimants could place a lien prior to title and rights of the trustee.

> "If an adjudication in bankruptcy follows an assignment, it has the effect of automatically and of its

own force avoiding the assignment. The Trustee immediately becomes invested with title to the property. *He does not take title as the successor of the assignee, but as the successor of the bankrupt.*" (Emphasis added.)

In re Neuburger, Inc. (1917—C. C. A. 2), 240 Fed. 947.

In the case of *Matter of Slomka* (1903—C. C. A. 2), 122 Fed. 630, 9 A. B. R. 635, bankruptcy proceedings followed a general assignment for benefit of creditors by less than four months. In ruling against claims for wage priorities based upon a state statute allowing such priorities in the case of such general assignment, the Circuit Court said,

"The assignment being void, it is as though it had never been made, and the property of the debtor passed to the trustee in bankruptcy free from all liens or trusts created by or resulting from it."

It would seem, therefore, that the Circuit Court has done violence to the clear meaning of Section 70(a)(8) as to the title which vests in the trustee of a bankrupt estate; and furthermore it has rendered a decision in conflict with decisions of this court and of the Circuit Court for the Second Circuit in holding that a lien arising solely by virtue of an assignment for the benefit of creditors has some undescribed and unique quality which allows it to remain solid and subsisting after all other phases of the assignment are totally nullified by subsequent bankruptcy proceedings.

POINT III.

The Circuit Court's Interpretation of California Code of Civil Procedure Section 1204, Would Extend to Seven Months the Period in Which Priority Rights Accrue to Wages—Directly Contrary to the Provisions of Congress.

The Bankruptcy Act, enacted by Congress, provides for priority of payment out of bankrupt estates, of wages earned within three months of the bankruptcy, due to workmen, servants, clerks or salesmen (Sec. 64(a)(2)). The interpretation necessarily placed upon Section 1204 by the District Court and the Circuit Court in this matter has the effect of extending the priority of labor claims from three months to seven months, viz: Services rendered within the three months prior to a general assignment which, in turn, occurs within four months prior to the commencement of the bankruptcy proceedings. This is directly contrary to the superior and exclusive provision by Congress. A similar contention on behalf of a similar statute was directly rejected by a Federal District Court in Minnesota.

> *In re Penticoff*, 36 Fed. Supp. 1 (D. C. Minn.—1941).

The Minnesota statute purported to give a workman "a lien upon all the property of his employer, as against any attachment or execution levied thereon, for the security of his wages earned within the six months last preceding" up to $200.00. (Sec. 3548, Mason's Minn. Stat. 1927.) The court said:

> "Congress may determine the priority in payment to be given wages and other claims irrespective of any State statute, and the extent to which said power is exercised becomes exclusive" (at page 3)

Conclusion.

From the foregoing it would appear that the errors of the Circuit Court in regard to federal questions are of such general public concern as to justify the interposition of this court for each of the reasons stated in the petition.

Respectfully submitted,

FRANCIS F. QUITTNER,

Attorney for Petitioner and Appellant Below.

ROBERT H. SHUTAN,

Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 136

CRULES R. CHEEK, TRUSTEE IN BANKRUPTCY OF WEST BEVERLY CORPORATION, Bankrupt,
Petitioner and Appellant Below,

vs.

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA,
Respondent and Appellee Below.

RESPONDENT'S OPPOSING BRIEF

FRED N. HOWSER,
Attorney General of the State of California,

FRANK W. RICHARDS,
Deputy Attorney General of the State of California,
Attorneys for Respondent.

PAULINE NIGHTINGALE and
EDWARD M. BELASCO,
Attorneys of Division of Labor Law Enforcement, Department of Industrial Relations, State of California,
Of Counsel.

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No. 136

CRULES R. CHEEK, TRUSTEE IN BANKRUPTCY OF WEST BEVERLY CORPORATION, Bankrupt,

Petitioner and Appellant Below,

vs.

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA,

Respondent and Appellee Below.

RESPONDENT'S OPPOSING BRIEF

Petitioner seeks a review by this Honorable Court of a final judgment of the United States Circuit Court of Appeals for the Ninth Circuit, which judgment affirmed the judgment of the District Court of the United States for the Southern District of California, Central Division. The judgment holds that a California statute, Sec. 1204 of the California Code of Civil Procedure, operates to create liens in favor of wage claimants, which liens survive bankruptcy by virtue of Sec. 67(b) of the Bankruptcy Act (U.S.C. Title 11, Chap. 7, Sec. 107).

OPINION BELOW

The opinion of the United States Circuit Court of Appeals, reported at 166 F. (2d) 429, is set forth in full in the record (R. 55-58) and for this Court's convenience is also set forth in the Appendix herein, ps. 1-5.

STATEMENT OF CASE

The facts are undisputed. Respondent is statutory assignee of the wage claims of two former employees of the bankrupt. On October 2, 1945 the employer, later the bankrupt, made a general assignment for the benefit of its creditors. Respondent filed with the assignee for the benefit of creditors a formal written notice of claim in which prior labor liens were claimed by virtue of the provisions of Sec. 1204 of the California Code of Civil Procedure. The lien claims were within the statutory amounts and were based on unpaid wages earned within 90 days prior to the assignment for benefit of creditors. On January 31, 1946 bankruptcy ensued, and Respondent filed a statutory lien claim in the bankruptcy proceeding under the provisions of Sec. 67(b) of the Bankruptcy Act (U.S.C., Title 11, Chap. 7, Sec. 107). Claim was not made before the referee in bankruptcy for priority wages under Sec. 64(a)(2) of the Bankruptcy Act (U.S.C., Title 11, Chap. 7, Sec. 104).

Following objection by the trustee in bankruptcy the referee in bankruptcy ordered that the lien claim was voided and allowed the claim only as general. Respondent sought review by the District Court and

the district judge reversed the order of the referee in bankruptcy. On appeal by the trustee in bankruptcy, the Circuit Court of Appeals for the Ninth Circuit affirmed the District Court.

STATUTES INVOLVED

The statutes involved herein are: Sec. 67b of the Bankruptcy Act, 11 U.S.C., Title 11, Chap. 7, Sec. 107:

> "The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court."

Sec. 1204 of the California Code of Civil Procedure:

> "When any assignment, whether voluntary or involuntary, and whether formal or informal, is

made for the benefit of creditors of the assignor, or results from any proceeding in insolvency or receivership commenced against him, or when any property is turned over to the creditors of a person, firm, association or corporation, or to a receiver or trustee for the benefit of creditors, the wages and salaries of minors, (miners), mechanics, salesmen, servants, clerks, laborers, and other persons, for personal services rendered such assignor, person, firm, association or corporation, within 90 days prior to such assignment, or the taking over of such property, or to the commencement of the proceeding when a court action is involved, and not exceeding two hundred dollars ($200) each, constitute preferred claims and liens as between creditors of the debtor, and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor, insolvent, or debtor whose property is so turned over, and must be paid as soon as the money with which to pay same becomes available. If there is insufficient money with which to pay all such labor claims in full the money available must be distributed among the claimants in proportion to the amount of their respective claims. The trustee, receiver or assignee for the benefit of creditors shall have the right to require sworn claims to be presented and shall have the right to refuse to pay any such preferred claim, either in whole or in part, if he has reasonable cause to believe that such claim is not valid but must pay any part thereof that is not disputed, without prejudice to the claimant's rights, as to the balance of his claim, and withhold sufficient money to cover the disputed portion until the claimant in question

has a reasonable opportunity to establish the validity of his claim by court action, either in his own name or through an assignee.

"This section is binding upon all the courts of this State and in all receivership actions the court must order the receiver to pay promptly out of the first receipts and earnings of the receivership, after paying the current operating expenses, such preferred labor claims and such liens."

QUESTION PRESENTED

Does the Decision Rendered Herein By the United States Circuit Court of Appeals for the Ninth Circuit Conflict With Applicable Decisions of the Supreme Court of the United States or With Decisions Rendered in Other Circuits of the United States Circuit Court of Appeals?

SUMMARY OF ARGUMENT

A. The Circuit Court of Appeals for the Ninth Circuit followed applicable decisions of the Supreme Court of the United States in holding that the lien created by statute did not fall with the assignment for benefit of creditors when bankruptcy ensued.

B. The Circuit Court of Appeals for the Ninth Circuit did not conflict with applicable decisions of the other Circuits when it held that Section 1204 of the California Code of Civil Procedure created a valid statutory lien in favor of wage claimants, which lien is recognizable under Section 67(b) of the Bankruptcy Act.

ARGUMENT

A. The Circuit Court of Appeals for the Ninth Circuit Followed Applicable Decisions of the Supreme Court of the United States in Holding That the Lien Created by Statute Did Not Fall With the Assignment for Benefit of Creditors When Bankruptcy Ensued.

Petitioner is incorrect when he states at page 18 of his Brief that *Randolph* v. *Scruggs,* 190 U. S. 533, is long standing authority for the proposition that *all* (emphasis ours) aspects of a general assignment for the benefit of creditors are voided upon the commencement within the designated time of bankruptcy proceedings, and that the voidance dates back to the time of the assignment. On several occasions this Honorable Court has set forth the exception to the above rule and the exception applies to statutes of the type in the case at bar. The exception was first noted in the Circuit Court of Appeals in the case of *In re Bennett,* 153 Fed. 673, where it was held that a Kentucky statute creating a lien upon property of one who made an assignment for the benefit of creditors was not voided by a subsequent bankruptcy. In its opinion the Court distinguishes between the rule in *Randolph* v. *Scruggs,* supra, and the rule where a state statute is involved, holding:

> "The claim for a lien for professional services denied in *Randolph* v. *Scruggs* was for services in preparing a deed of general assignment, which, having been made within four months of bankruptcy, was avoided as a consequence of the adjudication of bankruptcy. This deed of assignment

provided that the fees of Randolph et al. should be first paid by the trustee thereunder; but the Court said that the effect of avoiding the deed of assignment was to avoid it as a whole, and that the 'appellants can assert no preference by way of lien under the deed.' There was no claim of any preference under any state statute given to counsel preparing such an assignment. The assignment was valid under the law of that state, but when it was avoided the security provided by the deed for the professional services sued upon had no better footing than the security provided by the same instrument for every other debt of the assignor. The case is not in point at all."

The distinction between the *Bennett* case and the case of *Randolph* v. *Scruggs* was recognized by this Honorable Court in the case of *Globe Bank & T. Co.* v. *Martin,* 236 U. S. 288, where this Honorable Court stated in reference to the *Bennett* case:

"But an examination of that case shows that it dealt with a statutory lien created under Section 2487 of the Kentucky statutes, giving preferences to persons furnishing materials or supplying to manufacturing companies, and creating a lien upon the property in cases of such companies in case of an assignment for the benefit of creditors, or where the property is distributed among creditors by operation of law or by an act of the company. It was held that such statutory lien gave a special right in or inchoate lien upon the property from the date of furnishing the material, within the spirit and meaning of Section 64(b), Subdivision 5, of the Bankruptcy Act. That case,

> and such cases as *Re Laird,* 48 C.C.A. 538, 109 Fed. 550, which dealt with labor claims, recognizes the purpose of Congress in passing Section 64(b), to maintain statutory liens and preferences in such cases in the distribution of the bankruptcy estate * * * Under our system of bankruptcy, in the administration of assignments under state laws, there are certain persons, such as those furnishing material or labor that, in certain specified ways, are given preferences in the distribution of insolvent estates. It is a statutory lien of that kind with which the court dealt in *Re Bennett.*"

Later in the case of *Marshall* v. *People of State of New York,* 254 U. S. 380, this Honorable Court again approved the *Bennett* case, stating in part as follows:

> "The right of priority has been likened to the equitable lien * * * The analogous preference in payment goes to claims for labor by state statutes, and to which the Bankruptcy Act gives priority, have been described as being 'tantamount' to a lien. *In re Laird,* 109 Fed. 550, 555; 48 C.C.A. 538; *In re Bennett,* 153 Fed. 673, 677; 82 C.C.A. 531. The priority is a lien in the broad sense of the term 'which includes those preferred or privileged claims given by statute or admiralty law.' "

It seems clear that liens of the type in the instant case do not arise out of the assignment but are created by the statute; the statute sets forth certain situations under which lien rights arise and provides certain procedure necessary for the perfection of the lien. The occurrence of the assignment for the benefit of creditors is merely the act which causes the lien

to spring forth from the statute. This is true with all statutory liens; under a given set of facts lien rights arise, and by certain acts the lien itself is perfected.

In rendering its opinion the Circuit Court below relied upon and cited the case of *Globe Bank & T. Co.* v. *Martin,* supra. Respondent respectfully urges that it is correct when it asserts that there is no conflict between the judgment of the Circuit Court herein and applicable decisions of this Honorable Court.

B. The Circuit Court of Appeals for the Ninth Circuit Did Not Conflict With Applicable Decisions of the Other Circuits When It Held That Section 1204 of the California Code of Civil Procedure Created a Valid Statutory Lien in Favor of Wage Claimants, Which Lien Is Recognizable Under Section 67(b) of the Bankruptcy Act.

In his first assignment of error on page 11 of his brief Petitioner alleges that the Circuit Court of Appeals erred in holding that Sec. 1204 of the California Code of Civil Procedure created a valid statutory lien in favor of wage claimants and not merely a priority or preference.

This issue is a fundamental one in the case and brings into focus the rule of law established in the case of *Strom* v. *Peikes,* (C.C.A. 2d), 123 F. (2d) 1003. In that case it was held that Sec. 67(b) of the Bankruptcy Act could not give priority to a claim to wages earned more than three months before the bankruptcy proceedings but within three months prior to the date of the bankrupt's prior assignment

for the benefit of creditors, where such claim was based upon the contention that the New York Debtor and Creditor Law gave a preference to wages or salaries owing to employees' assignee for services rendered within three months prior to the execution of the assignment for the benefit of creditors. The Second Circuit held that the state statute in question did not create a lien within the purview of the Bankruptcy Act but merely created a priority of distribution. Respondent believes that the said rule of law is correct and upon the authority of *Strom* v. *Peikes,* supra, was instrumental in having the California State Legislature amend Sec. 1204 of the California Code of Civil Procedure in 1945 so as to change a preference and priority statute into a lien statute.

In *Winrod* v. *Wolters,* 141 Cal. 399, the Supreme Court of California, in passing on a statute involving wage claims in attachment and execution proceedings, said:

> "When the legislature intends to give a lien, it says so and prescribes the conditions under which it shall exist, as in the Mechanics' Lien Law and in the statutes giving laborers liens upon certain property. Had the legislature intended to confer a lien in the case under consideration, there was nothing to prevent it from saying so in apt words."

The California legislature heeded this admonition when it amended in 1945 the statute involved herein, and by its act Respondent respectfully urges that it created one of the "statutory liens in favor of em-

ployees" as provided in Sec. 67(b) of the Bankruptcy Act.

The Ninth Circuit below in rendering its decision recognized the action of the California legislature, stating:

> "The California legislature has done what it could to provide means for the protection of laborers in a case like this. The essential attributes of a lien are present here."

Petitioner urged on page 4 of his petition that the Circuit Court of Appeals for the Third Circuit in the case of *In re Ko-Ed Tavern,* (C.C.A. 3d) 129 F. (2d) 806, rendered an opinion which is in direct conflict with the opinion of the Ninth Circuit in the instant case. An examination of the two statutes involved illustrates that no such conflict exists between the two Circuits of the United States Circuit Court of Appeals. The New Jersey statute (N. J. Rev. Stat. (1937) 14:14-21) provides:

> "In case of the insolvency of a corporation, all persons doing labor or service of any character, in the regular employment of the corporation, shall have a lien upon its assets for the wages due them respectively for all labor, work and services performed within two months last preceding the date when the insolvency proceedings shall be actually instituted against such insolvent corporation."

It can readily be seen that none of the attributes of a lien are created by the New Jersey statute, and that by simply designating a priority or preference as a

lien in a statute does not in and of itself create a statutory lien within the meaning of Sec. 67(b) of the Bankruptcy Act.

Sec. 1204 of the California Code of Civil Procedure does create a bona fide lien; the section sets forth the means of perfecting the lien by the presentation of sworn claims to the trustee, receiver or assignee for the benefit of creditors; it provides that the trustee, receiver or assignee for the benefit of creditors must withhold sufficient money from his disbursements to cover the disputed portion of any claim filed under the said section; it provides for the claimant to have an opportunity of court action to establish the validity of his lien claim. In this respect there is a marked similarity between wage claims arising under Sec. 1204 of the California Code of Civil Procedure and wage claims arising under the California Mechanics' statute, Sec. 1183 of the California Code of Civil Procedure. Mechanics' liens arise by filing lien claims with the County Recorder; to enforce their mechanics' liens the wage claimants must file a civil action in a state court within the required time. Under the insolvency statute herein the wage claimants, whose employer turns his assets over to an assignee for the benefit of creditors, must file their sworn claims with the assignee; to enforce their lien claims in the event of a dispute they must also file action in the appropriate state court. That mechanics' lien claims are recognized in bankruptcy under Sec. 67(b) of the Bankruptcy Act is so undisputed that it is unnecessary to cite cases.

Other decisions of the United States Circuit Court of Appeals are completely in accord with the decision in the instant case. The Fifth Circuit was confronted with city, county and state tax liens in the case of *City of Dallas, et al.* v. *Ryan,* (C.C.A. 5th) 62 F. (2d) 959. The Court therein held that the tax liens in favor of the State of Texas and of the County were mere priorities; that bona fide liens were not created, and distinguished them from certain City tax liens which were recognizable in bankruptcy as being bona fide liens. That Court stated, in part:

> "The City taxes have been better cared for by the statutes. Article 1063 gives the cities the benefit of the general tax laws but Article 1060 goes further, providing: 'All taxes shall be a lien upon the property upon which they are assessed.' Section 194 of the charter of the City of Dallas is still more liberal, reading: 'A lien is hereby created on all property, personal and real, in favor of the City of Dallas for all taxes, ad valorem, occupation, or otherwise. Said lien shall exist from January 1st in each year until all the taxes are paid. Such lien shall be prior to all other claims and no gift, sale, assignment, transfer of any kind or judicial writ of any kind can ever defeat such lien.' "

In its decision the Court points out that statutes having to do merely with seizure and sale do not create liens:

> "We think a true general lien for all city taxes is given the City of Dallas by the language last quoted, which adheres to the property notwith-

standing its transfer and which, requiring no record, is good as a lien in bankruptcy. All property of the taxpayer falls under it, so that it is unnecessary to identify that assessed for the particular tax."

In the case of *Knox-Powell-Stockton*, 100 F. (2d) 979, (C.C.A. 9th), the Ninth Circuit was faced with another California statute, the Oil and Gas Conservation Act of California, Act 4916, Deering's General Laws, and held that a valid lien was created which could be asserted in a bankruptcy proceeding. The Court held that the laws of the state where the adjudication is had are controlling as to the validity and extent of the liens; that any statutory liens come within the provisions of Sec. 67(b) of the Bankruptcy Act.

Probably the strongest case in point illustrating that there is no conflict between the decision in the instant case and decisions in other cases is *Halpert v. Industrial Commissioner* (C.C.A. 2d), 147 F. (2d) 375. The issue in that case concerned the validity of a claimed statutory lien upon assets of the bankrupt in favor of the Industrial Commissioner of the State of New York to secure an award of compensation to an employee of the bankrupt. The Court stated in part:

"The sole question before us is whether or not Section 34 of the Workmen's Compensation Law creates a lien. That section, entitled 'Preferences,' provides that the awarded compensation shall be a lien against the assets of the carrier or employer

> without limit of amount, subordinate, however, to claims for unpaid wages and prior recorded liens * * * The trustee nevertheless contends that the use of the word 'lien' in the section is an inadvertence, and that merely a state priority is created, which, since the amendment in 1938 is no longer recognized by the Bankruptcy Act * * * (*Strom* v. *Peikes,* 2 Cir., 123 F. 2d, 1003, 138 A.L.R. 937; 51 Yale L.J. 863). He argues that a lien must be perfected by making it a matter of public record through filing, recording or docketing, and that there are no such requirements in the present instance."

In reaching its conclusion, the Second Circuit, having *Strom* v. *Peikes* (supra) in mind, looked to the statute and found that a lien, rather than a priority, was created. It is submitted that the same rule applies in interpreting Sec. 1204 of the California Code of Civil Procedure. We quote the Court:

> "We should use the state decisions to define the interest created by state law, and then it becomes a question under the Bankruptcy Act whether fairly considered the interest thus defined is a lien or merely a preferred claim * * * however, the trustee's contention must fail, in any event, since Section 34 of the Workmen's Compensation Law, when read with Section 20, provides for the filing of an award with the State Department of Labor, thereby prescribing a procedure substantially identical with that contained in statutes containing the perfection of the lien. This award was filed with the Department of Labor both before bankruptcy and within the period provided by

> state law. Consequently it comes within the terms, as it seems well within the policy, of Section 67, Sub. (b) of the Bankruptcy Act * * * to constitute a valid statutory lien, enforcible against the trustee."

The Ninth Circuit cited and followed the reasoning of the Second Circuit in the *Halpert* case, and both of these Circuits cited and followed the reasoning of the Third Circuit in *Strom* v. *Peikes,* supra. The holding of the Fifth Circuit in the *Ryan* case is in accord with the three Circuits above mentioned. Respondent strongly disagrees with Petitioner's contention that there is conflict with the Third Circuit in the *Ko-Ed Tavern* case, and maintains that *Ko-Ed Tavern* is decided upon the same principles of law as the other cases. The procedure followed throughout appears identical; each court examines the state statute and makes a determination of whether or not a bona fide lien, or merely a preference or priority, is created. If a bona fide lien is created, it is then recognized under the provisions of Sec. 67(b) of the Bankruptcy Act. *In re Slomka,* 122 Fed. 630, and *In re Penticoff,* 36 Fed. Sup. 1, cited by Respondent, are not in point as the statutes involved do not purport to create liens but only grant preferences, which under the rule of *Strom* v. *Peikes,* supra, are not assertible under Sec. 67(b) of the Bankruptcy Act.

Petitioner makes the further contention on page 21 of his brief that the interpretation of the statute involved would extend to seven months the period in which priority rights accrue to wages. This conten-

tion can be disposed of by the fact that no claim is made herein for priority wages under Sec. 64a(2) of the Bankruptcy Act. It is unquestioned that no state legislature could lengthen or otherwise alter the three months' priority wage period established by Congress in Section 64a(2) of the Bankruptcy Act; wage claims falling in that category are granted priority over statutory liens and the Court below was well aware of this fact, stating (R. 34):

> "Upon intervention of the bankruptcy proceeding the state agency made formal claim to statutory liens on account of the amounts owing these laborers, but the referee allowed them only as general unsecured claims. Parenthetically we may observe that appellee does not dispute this classification if it is without lien rights, that is to say it does not claim the benefit of Section 64(a)(2) of the Act, which gives priority to wages earned within three months before the commencement of the bankruptcy proceeding, c.f. *Strom* v. *Peikes*, 123 F. 2d 1003."

The claim in the instant case is a lien claim, and as shown above there is no conflict among the Circuit Courts concerning the right to assert such a claim under the appropriate provision of the Bankruptcy Act. Circuit Judge Healy's closing words are significant:

> "Liens having the aim of the one before us are just and are eminently suited to the necessities of the situations in which they are provided. They should be recognized if they come, as this one does, within the spirit and fairly within the letter

of the Bankruptcy Act. We conclude that the judgment of the district court giving effect to appellee's claims is right and should be affirmed."

CONCLUSION

Respondent respectfully urges that the decision of the Court below was correct when it held that Sec. 1204 of the California Code of Civil Procedure created a bona fide statutory lien within the purview of Sec. 67(b) of the Bankruptcy Act and respectfully urges that the petition filed herein for the writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

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APPENDIX

OPINION OF THE UNITED STATES CIRCUIT COURT OF APPEALS
In the United States Circuit Court of Appeals for the Ninth Circuit

CRULES R. CHEEK, Trustee in Bankruptcy of West Beverly Corporation, Bankrupt, Appellant,

vs.

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA, Appellee

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Opinion—March 4, 1948

Before Denman, Healy, and Bone, Circuit Judges

HEALY, Circuit Judge:

The question here is whether or not a California statute (Sec. 1204 Cal. Code Civil Procedure) operates to give to wage claimants liens which survive bankruptcy by virtue of Sec. 67(b) of the Bankruptcy Act 11 USCA Sec. 107(b).

On October 2, 1945, the bankrupt made a general assignment for the benefit of creditors. On January 1, 1946, the bankruptcy proceeding was instituted by the filing of an involuntary petition. The two laborers whose rights are in dispute had performed personal services for the bankrupt within the period of 90 days preceding the general assignment. These employees, through the State Division of Labor Law Enforcement, filed with the assignee formal written notice claiming labor liens pursuant to the state statute, one claim being for $200, the other for $82.50. When the claims were filed the assignee had on hand sufficient assets to pay them, which assets he later surrendered to the trustee.

Upon intervention of the bankruptcy proceeding the state agency made formal claim to statutory liens on account of the amounts owing these laborers, but the referee allowed them only as general unsecured claims. Parenthetically we may observe that appellee does not dispute this classification if it is without lien rights, that is to say it does not claim the benefit of Sec. 64(a)(2) of the Act, which gives priority to wages earned within three months before the commencement of the bankruptcy proceeding, cf. *Strom* v. *Peikes,* 123 F. 2d 1003. The referee's decision was reversed on review by the court, and the trustee appeals.

The material provisions of the state statute are shown on the margin.[1] Prior to an amendment made in 1945 this law provided only a preference of claims for personal services, but in the year mentioned the language which we have italicized was interpolated with the obvious purpose of raising the preference to the dignity of a lien upon the assets coming into the hands of the assignee. The position of the trustee, which was likewise the basis of the referee's ruling, is that the amendment did not effectuate that purpose,

[1] "When any assignment * * * is made for the benefit of creditors of the creditors of the assignor * * * the wages and salaries of minors, mechanics, salesmen, servants, clerks, laborers, and other persons, for personal services, rendered such assignor, within 90 days prior to such assignment, and not exceeding two hundred dollars ($200) each, constitute preferred claims *and liens as between creditors of the debtor*, and must be paid by the trustee, assignee or receiver before the claim of any other creditor of the assignor, insolvent, or debtor whose property is so turned over, and must be paid as soon as the money with which to pay same becomes available. The trustee, receiver or assignee shall have the right to require sworn claims to be presented and shall have the right to refuse to pay any such preferred claim, either in whole or in part, if he has reasonable cause to believe that such claim is not valid but must pay any part thereof that is not disputed * * *

"This section is binding upon all the courts of this State and in all receivership actions the court must order the receiver to pay promptly out of the first receipts and earnings of the receivership, after paying the current operating expenses, such preferred labor claims *and such liens*." Section 1204 Cal. Code Civil Procedure. (Emphasis supplied.)

in the sense, at any rate, of Sec. 67(a)(2) of the bankruptcy law. The primary argument in support of the position taken is that the lien could come in to being only upon the making of a general assignment, and when, upon the filing of the bankruptcy petition, the general assignment was voided, the lien fell with the assignment.

By Sec. 67(a)(1) of the Act of Congress provided that every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process within four months before the filing of a petition in bankruptcy shall, under conditions not material to state here, be deemed to be null and void. But it further provided, in subdivision (b) of the section, that "statutory liens in favor of employees * * * created * * * by the laws * * * of any state, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy * * *"

The California legislature has done what it could to provide liens for the protection of laborers in cases like this. The essential attributes of a lien are present here. But some of the reported decisions cast doubt upon the view that such a lien survives bankruptcy. Cf. *City of Dallas* v. *Ryan,* 5 Cir., 62 F. 2d 959; In the Matter of Ko-Ed Tavern, Inc., 3d Cir., 129 F. 2d 806. In the *Ko-Ed Tavern* case, however, the court had at hand a decision of the state court (New Jersey) holding that the state statute failed to create a lien. To date the California courts have not spoken on the effect of the local statute.

On the other side, In re Bennett, 6 Cir., 153 Fed. 673, is squarely contra to the view that a preference

or lien created by a state insolvency statute, and which arises upon the making of an assignment for creditors, is voided by bankruptcy. Judge Lurton's opinion in that case was commented upon with apparent approval by the Supreme Court in Globe Bank v. Martin, 236 U. S. 288. It holds that a preference or lien so created survives and is recognized in bankruptcy.

Two recent decisions of the Second Circuit, Strom v. Peikes, 123 F. 2d 1003, and Halpert v. Industrial Commissioner of New York, 147 F. 2d 375, are in point and we read both as supporting the disposition made of this case below. The trustee himself relies on the first of these decisions, *Strom* v. *Peikes,* as supporting his position, but there the state statute provided for no more than a preference for wage claims upon the making of an assignment for the benefit of creditors. No lien was attempted to be created. There is in the opinion no suggestion of the thought that if a lien had in fact been given it would have been ineffective in the bankruptcy proceeding which ensued. The whole reasoning of the opinion, indeed, is to the contrary. In *Halpert* v. *Industrial Commissioner* the state statute created liens securing awards of compensation in favor of workmen without any requirement in respect of their being made matters of public record. The court thought that the statute effected a lien, and not merely a preference as had been the case in *Strom* v. *Peikes.* It held the lien valid and enforcible against the trustee in bankruptcy.

Liens having the aim of the one before us are just and are eminently suited to the necessities of the situations in which they are provided. They should be

recognized if they come, as this one does, within the spirit and fairly within the letter of the Bankruptcy Act. We conclude that the judgment of the district court giving effect to appellee's lien claims is sound and should be affirmed.

Affirmed.

(Endorsed:) Opinion. Filed Mar. 4, 1948. Paul P. O'Brien, Clerk.

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